LIBRARY
SUPREME COURT, U. S.

FILED
JUN 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 1428

JESSE ALEXANDER ELLER, ET AL.,
Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PETER S. SMITH,
RICHARD V. FALCON,
DAVID S. BOGEN,
500 W. Baltimore St.,
Baltimore, Maryland 21201,
KENNETH L. JOHNSON,
GERALD A. SMITH,
HOWARD, BROWN AND WILLIAMS,
1500 American Building,
Baltimore, Maryland 21201,
Attorneys for Respondents,
Sylvester J. Vaughns, et al.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Argument:	
Petitioners Raise No Substantial Question Meriting Review	6
I. The Decisions Below are Clearly Correct:	
A. The Dual School System Was Never Dismantled	6
B. The District Court Did Not Err in Approving the School Staff's Own Desegregation Plan or in Ordering that Plan Implemented Immediately	9
C. The Petitioner-Intervenors Were Not Denied Due Process	14
1. The Intervenors Consented to the Limitations on Their Intervention	14
2. Intervenors "Proffer" of "New Evidence" Is Irrelevant	15
II. There is No Conflict Between the Decisions Below and the Decision of the Maryland Court of Appeals	17
Conclusion	18

Table of Authorities

Cases

Alexander v. Holmes Co. Brd. of Educ., 396 U.S. 19 (1969)	14

PAGE

Borders v. Board of Education, 265 Md. 488, 290 A.2d 510 (1972) 17

Carter v. West Felicione Parish Sch. Brd., 396 U.S. 290 (1970) 14

Davis v. Bd. of Commissioners, 402 U.S. 33 (1971) 16

Green v. School Board, 391 U.S. 430 (1968) 9

Raney v. Bd. of Educ., 391 U.S. 443 (1968) 16

Swann v. Charlotte-Michlenburg Brd. of Ed., 402 U.S. 1 (1971) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 1428

JESSE ALEXANDER ELLER, ET AL.,
Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the district courts judgment that a dual school system was not dismantled by school board policies the effect of which were

to leave more than 56% of its schools in excess of 90% white or 90% black or in affirming the district courts remedial order that effected the immediate implementation of a desegregation plan totally designed by the school board and presented to the court by it for its approval.

2. Whether the Court of Appeals erred in affirming the district courts entry of a consent order permitting petitioners to intervene, on a limited basis only, where intervenors did not object to, and, in fact, affirmatively consented to, those limitations.

3. Whether the existence of dicta on the nature of segregation contained in a previous opinion of the Maryland Court of Appeals, in a case in which white parents unsuccessfully fought to enjoin the school board from taking any and all steps to desegregate, conflicts with the orders of the federal courts below, or otherwise limits their remedial powers.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are Amendment V, Constitution of the United States—

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are Title 42, United States Code § 1983—

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

> be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

and Title 42, United States Code § 2000d—

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

This suit was commenced March 29, 1972 by plaintiffs, the parents of eight children attending the Prince George's County public schools against the Board of Education of Prince George's County, its members, and the superintendent of schools, seeking declaratory and injunctive relief to remedy racial discrimination resulting in segregation of children and faculty and racial discrimination in the district's provision of public education (J.A. 6a).[1]

Both parties filed an extensive joint stipulation of facts (J.A. 111a)[2] and eighteen exhibits thereto (J.A. 153a-254a). The exhibits included a letter from the Director of the Office for Civil Rights of HEW stating that his office had approved the school district's plans in 1969, but that the plan was not adequate under the standards enunciated in *Swann v. Charlotte Mecklenburg*, so a new plan would be required (J.A. 249a-251a).

On July 25, 1972, the district court granted a motion of plaintiffs for summary judgment insofar as the motion sought a declaration that the defendants had not dismantled their dual school system or converted to unitary operation.

---

[1] References to the Joint Appendix on Appeal filed in the Court of Appeals are noted as "J.A."

[2] Hereinafter, unless otherwise indicated, all references to the Joint Appendix (J.A.) should be to the Joint Stipulation of Facts filed by the plaintiffs and the defendant school board.

It also ordered the defendants to continue to work on desegregation plans which were then in progress, to file a progress report on said plans on August 22, 1972 and set a hearing date on August 25, 1972, to consider the reports due on August 22, and the question of the type and nature of relief required (P.A. 64c; 65a).[3]

On August 23, 1972, petitioners here filed a motion to intervene (P.A. 75a). Pending disposition of their motion, they participated in a limited way in the hearings which were held from August 25-31. On August 31, 1972, the district court filed an order and opinion (P.A. 52a) which directed the defendants to complete desegregation plans on a schedule which would desegregate only the elementary and the junior high schools by January of 1973 and defer desegregation of the senior high schools until September, 1973 and to present such plans on or before December 4, 1972 for hearing scheduled on December 11, 1972.

Petitioners motion to intervene was granted as of September 1, 1972 on condition, *inter alia*, that they were satisfied with their limited rights during the proceedings until the Court's order of August 31 and that they would present no new evidence relating to the issue of existing compliance with the standards of equal protection as opposed to evidence relating to questions pertaining to type and timing of relief (P.A. 72a). Counsel informed the court that this order was fully and completely acceptable to them and to their respective clients (P.A. 72a at paragraph 6).

Both the defendant school board and the intervenors appealed from the district court's decisions of July 25 and August 31, and the plaintiff cross-appealed from that portion

[3] References to the Appendix to the Petition for certiorari are noted as "P.A."

of the district court's August 31 order which deferred senior high desegregation until September, 1973. On the appeals the Court of Appeals stated that the only substantial question of substance raised by any the appeals was whether the court could properly delay implementation of a plan for the senior high schools until September, 1973, and "that question is one that is, and will be, within the bosom of the District Court." The case was remanded for further proceedings in the district court.

The intervenors-petitioners petitioned the Court for a Writ of Certiorari based upon the District Court's orders and the mandate of the Court of Appeals on November 30, 1972 (Case No. 72-799), in which petition the petitioners raised basically same issues as are raised in the present petition. The petition was denied on January 22, 1973.

On remand, and after further hearings and the submission of alternative outlines of desegregation plans by the defendant school board a third opinion was issued by the district court on December 13, 1972, which, in essence, described the progress and problems encountered in developing what the court considered to be a constitutionally acceptable plan while at the same time minimizing the transfer and transportation of students (P.A. 33a).

On December 29, 1972 a final decision and order on the issue of student assignment was entered by the district court. The court approved a desegregation plan prepared by school district staff members (hereinafter referred to as "staff plan") and ordered its implementation except for the twelfth grade by January 29, 1973, or the start of the second semester of the current school year (P.A. 11a). The defendants and intervenors noted their appeal from that decision on January 8, 1973 and filed an Application to Stay, pending appeal, with the Court of Appeals on January 9, 1973. The

Court of Appeals postponed consideration of the stay application, ordered early submission of briefs and set and heard argument on the merits on January 22, 1973. On that date, the Court of Appeals, sitting *en banc*, issued a *per curiam* opinion affirming the district court (P.A. 1a).

The defendants and intervenors filed Applications to Stay with the Chief Justice, which were referred by him to the Court, and by the Court denied on January 26, 1973.

The desegregation plan was implemented, as ordered, on January 29, 1973.

ARGUMENT

Petitioners here raise no substantial questions. On the basis of the facts stipulated by plaintiffs and defendants and not questioned by intervenors, defendants never operated a unitary school system. Their obligation to dismantle their dual school system was never discharged, the remedy ordered by the district court did not exceed its discretionary power, and the immediate implementation of the remedy was compelled by previous decisions of the Court. There is no conflict in any court decisions on these issues.

I.

THE DECISIONS BELOW ARE CLEARLY CORRECT

A. The Dual School System Was Never Dismantled.

There follows a summary of the major and relevant facts contained in the 143 page Joint Stipulation of facts relied upon by the district court in ruling that the dual system was never dismantled.

The defendants school system consists of all public schools in Prince George's County, Maryland. It operates 232 schools with 162,828 pupils (J.A. 236a). Of this number,

36,450 (22.4%) are black and 126,378 (77.6%) are white (J.A. 236a).

Until 1954, the county maintained a dual school system, segregated by law (J.A. 111a).

From 1954 until 1965, the county operated under a "freedom of choice" plan. In 1964-65, the last year of operation of the plan, over 82% of the district's black students attended schools which were 100% black and over 73% of the white students attended schools which were over 95% white (J.A. 218a).

In 1965-66, the school district adopted a "geographic attendance zone" plan which, after adoption, preserved intact the dual school system. 141 of the district's then 180 schools (79%) remained schools whose student bodies were in excess of 90% white or 90% black (J.A. 219a).

From 1965 until 1972, the defendants continued to operate under their "geographic zones", changing from time to time, most, if not all, the boundaries of their schools. At all times, however, no fewer than 69% of their schools were in excess of 90% white or 50% black (J.A. 236a). At the time suit was filed 130 of 232 schools (56%) were in excess of 90% white or 90% black (J.A. 236a). 66% of the white students attended schools in excess of 90% white and 61% of the black students attended schools in excess of 50% black (J.A. 236a).

The continued operation of the school district as a dual system was more than a reflection of a mere failure to take affirmative action to convert to a unitary system. During the 1954-1972 period, the district utilized its construction program, its boundary setting power and its teacher assignment policies to maintain racially identifiable schools.

Thus of the 161 schools opened for occupancy in the 1954-1972 period, 134 (80%) were so sited and constructed

that, when they opened, they opened as schools where pupil enrollments were either in excess of 90% white or 90% black (Source: J.A. 153a-198a). During the 1962-1972 school years, the opening of these new schools required 409 boundary changes to be made at existing schools. Of these 409 boundary changes, only 36 (4%) were effected in a manner which reduced racial isolation in the affected schools. During the same period, teacher assignments were also racial and effected so as to increase the racial identifiability of schools since black teachers were assigned in the main, to schools whose pupil population was black (J.A. 155a-183a).

The effect of these polices, in combination, can be illustrated by the fact that all of the 118 schools which were in excess of 90% white when suit was filed were so constructed and sited and had had their boundaries so designed that they opened as schools with student populations in excess of 90% white and with overwhelmingly white teacher staffs. Eighty-five of these "white" schools opened prior to 1965, and the other 33 opened in the 1965-1972 period (Source: J.A. 153c-198a).

Similarly, the defendants used the same combination of siting, construction, boundary setting and teacher assignments to maintain identifiability of black schools. Thus of the 44 schools which were in excess of 50% black when suit was filed, 23 were so sited and constructed that they opened with pupil populations in excess of 50% black (Source: J.A. 153a-198a).

The 21 other schools which were in excess of 50% black opened as majority white schools. Of these, however, 19 witnessed a substantial increase of black students as a result of (1) increasingly disproportionate assignments of black faculty to them, thus "racially identifying" them and (2) increasingly enlarged capacities and changes in attendance

areas obviously designed to keep black students moving into the area within those schools and out of surrounding white schools (Source: J.A. 153a-198a).

For example, Ardmore is an elementary school that is now 96% black. It opened in 1960 with an all white enrollment of 159 students and an all white faculty. As the black population increased, so did its capacity and its black faculty. The faculty became 25% black in 1965-66, 49% black in 1967, and 79% in 1970. Its enrollment went from 159 in 1960 to 303 in 1964-65, at which time it was 28% black. In 1965-66, its enrollment was dramatically increased to 511, and its racial composition drastically altered to 60% black. As the black percentage of students (and faculty) increased, so did its capacity, and it now enrolls 647 students, 96% of whom are black. Ardmore adjoins Kettering (3.6% black) Woodmore (36% black); Glen Dale (13% black); Seabrook (11% black) and J. McHenry (43.3% black) (Source: J.A. 153a-198a).

Faced with these undisputed, because stipulated facts, the district court concluded that the district had failed to affirmatively discharge its duty to dismantle its dual school system. It was hardly error to so conclude. *Green v. School Board*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenberg Brd. of Educ.*, 402 U.S. 1 (1971).

B. The District Court Did Not Err in Approving the School Staff's Own Plan or in Ordering That Plan Implemented in Mid-Year.

The district court ordered the school board to submit its desegregation plan by December 4, 1972. The court specified no criteria to be used in designing the plan. On December 4th and December 7th the defendants submitted four outlines of alternative desegregation plans. There were no de-

tails given for any of the plans except for Plan I, and that only with respect to secondary schools (12-29-72 opinion at P.A. 14a). The school board's attorney stated that the plans denominated as Plan III (based on reducing the racial composition of but eight black schools to 35% black) and Plan IV (based on voluntary transfers) were not being recommended to the court, and that the school board was only submitting and recommending Plan I for secondary schools and Plan II for elementary schools for the court's approval (Trans. 12-4-72 at 159-60). Plan I was based on the goal of reducing to 35% the black population of schools currently majority black and required the transfer of 84,000 students (Trans. 12-4-72 at 191). The outline of Plan II stated that it was based on reducing majority black schools to 40%, but no details were given. The court indicated that it did not oppose such goals but criticized the inflexibility of fixed ratios (12-4-72 Trans. at 178-91). The court ordered the defendants to continue work on completing the details of a plan and suggested that the defendants be more flexible and less insistent on specific "racial balances" and that they be concerned with reducing the number of student transfers and with eliminating one-race schools. See 12-13-72 opinion at P.A. 41a. Neither defendants nor the intervenors ever objected to this approach or suggestion.

The 169 page staff plan which was finally submitted on December 26, 1972 and approved by the Court on December 29, 1972[3] states in its introduction that it was developed to decrease the percentage of minority students in those schools over the fifty percent level and to increase the percentage of minority students in those schools in excess of

[3] Counsel for all parties requested, and were granted, in chambers conferences on December 7, 11, 13 and 18 and 21, 1972 to consider and discuss details of the staff plan as it evolved in order to expedite hearings on the plan. See opinion of 12-13-72 at (P.A. 37a.)

ninety percent white.[4] At the elementary level, the plan divides the county into 11 geographic sectors and students are generally reassigned only within each sector.[5] The plan would transfer 32,823 of the district's student population of approximately 163,000. 187 of the system's 223[6] schools are affected by the plan and the number of students eligible for busing would increase from 78,364 to 90,761 (10,248 of the increase is at the elementary level).

After approving the final staff plan, the district court concluded that "defendants have not borne the burden of establishing reason for delay beyond January 29, 1973," and ordered it implemented on that date (Opinion of 12-29-72 at P.A. 30a). There follows a summary of the major findings and evidence upon which this ultimate finding was based.

1. The plan adopted by the district court was totally the work product of experts selected and permanently employed by the defendants. The plan designed by them was, in their professional opinion "just about as good a plan as the staff thought they could come up with" and "about as good as the staff felt could be done" (Transcript of 12-26-72 hearing at 75-6).

2. All parties conceded that the plan was educationally sound (Transcript of 12-26-72 hearing at 12).

---

[4] The plan leaves only 2 schools in excess of 50% black and 11 schools in excess of 90% white (P.A. 90a.)

[5] The percentage of black students within each sector varies from about 9% in group A to about 35.5% in group G.

[6] Of the 187 schools affected, 162 are the "one-race" schools discussed at 5, supra. The other 25 schools are involved in the plan in order to accomplish the desegregation of these schools. When the plan was submitted, defendant's counsel stated that defendants only objection to the plan, other than their general objection to submitting any plan at all, was to the date of implementation (Trans. of 12-26-72 at 10-12, 72-76).

3. The additional annual transportation operating cost in *Swann* was $1,000,000 imposed on a budget of $40,000,000 and the longest rides were 35 minutes. Here the estimated operating cost is $1,100,000 (12-29-72 opinion at A. 52a) imposed on a budget of $170,000,000 (Transcript of 8-31-72 hearing at *631*) and the longest ride is 35 minutes (which is a rarity under the plan) with the mean average ride being 14 minutes (Opinion of 12-29-72 at A. 48a). This average should be compared with present averages of 10, 11, and 18 minutes at the elementary, junior and senior high levels, respectively (J.A. 62a-63a).

4. Defendants stated that they felt the plan to be educationally sound, and that they had all the necessary staff, funds, equipment and the necessary time to implement the plan on January 29, 1973 (Transcript of 12-26-72 hearing at 72-73).

5. The defendants' own expert, the Board's Pupil Placement Officer, the man charged by them with the task of developing its desegregation plans, testified that its desegregation plans could be implemented in January, and that to do so would not be something that causes confusion, chaos or would be unsound (Transcript of 8-21-72 hearing at 820).

6. Counsel for defendants made the following proffer when plantiffs were pressing for first-of-year implementation plans as of September, 1972:

> "As between February '73 and September, '73 obviously for educational reasons September '73 is better than February '73. However, if the sole choice is September 5, 1972 and February '73, the proffer will be that they will do it. They much prefer it to be done in February" (Tr. of 8-21-72 at 586-87).

7. The defendants' principal witness, the superintendent of schools, testified that the main problem with mid-year changes was one of sufficient time to prepare for the change-over (Hassel, Tr. of 8-21-72 at 662-65).

8. The defendants' witnesses who testified as to the extensive administrative counseling and scheduling tasks that had to be accomplished agreed that given 4 to 5 weeks to accomplish their tasks, the tasks could be accomplished in a manner "whereby the educational process would not be impinged" (Principal Chotiner's affidavit at J.A. 320a; Principal Chotiner's testimony, transcript of 12-4-72 at 112. See also Principal Hrezo's affidavit at J.A. 325a).

9. Both defendant Board Member Wolf (Tr. of 8-21-72 at 581-84) and defendants' employee, Senior High School Principal Donald A. Kiah (Tr. 8-21-72 at 555-59) testified to the effect that further delay would engender educationally unsound disrespect for the law and all authority, that delay caused uncertainty and a loss of loyalty and identity with schools for those who would be transferred, and finally that the uncertainty and anguish felt by parents pending a change is such that it is best for the schools that necessary change be made as soon as possible.

10. The Board of Education voted, unanimously, on August 1, 1972, to implement desegregation plans for both senior and junior high schools in February, 1973 (J.A. 60a) even though all testimony was to the effect that these grade levels posed many more problems than did elementary schools (Opinion of 8-31-72 at A. 18a). Thus, the very Board charged by law with the sole responsibility for making educational policy decisions did not consider it educationally undesirable to implement mid-year changes.

3. The additional annual transportation operating cost in *Swann* was $1,000,000 imposed on a budget of $100,000,000 and the longest rides were 35 minutes. Here the estimated operating cost is $1,100,000 (12-29-72 opinion at A. 52a) imposed on a budget of $170,000,000 (Transcript of 8-31-72 hearing at *631*) and the longest ride is 35 minutes (which is a rarity under the plan) with the mean average ride being 14 minutes (Opinion of 12-29-72 at A. 48a). This average should be compared with present averages of 10, 11, and 18 minutes at the elementary, junior and senior high levels, respectively (J.A. 62a-63a).

4. Defendants stated that they felt the plan to be educationally sound, and that they had all the necessary staff, funds, equipment and the necessary time to implement the plan on January 29, 1973 (Transcript of 12-26-72 hearing at 72-73).

5. The defendants' own expert, the Board's Pupil Placement Officer, the man charged by them with the task of developing its desegregation plans, testified that its desegregation plans could be implemented in January, and that to do so would not be something that causes confusion, chaos or would be unsound (Transcript of 8-21-72 hearing at 820).

6. Counsel for defendants made the following proffer when plantiffs were pressing for first-of-year implementation plans as of September, 1972:

> "As between February '73 and September, '73 obviously for educational reasons September '73 is better than February '73. However, if the sole choice is September 5, 1972 and February '73, the proffer will be that they will do it. They much prefer it to be done in February" (Tr. of 8-21-72 at 586-87).

7. The defendants' principal witness, the superintendent of schools, testified that the main problem with mid-year changes was one of sufficient time to prepare for the change-over (Hassel, Tr. of 8-21-72 at 662-65).

8. The defendants' witnesses who testified as to the extensive administrative counseling and scheduling tasks that had to be accomplished agreed that given 4 to 5 weeks to accomplish their tasks, the tasks could be accomplished in a manner "whereby the educational process would not be impinged" (Principal Chotiner's affidavit at J.A. 320a; Principal Chotiner's testimony, transcript of 12-4-72 at 112. See also Principal Hrezo's affidavit at J.A. 325a).

9. Both defendant Board Member Wolf (Tr. of 8-21-72 at 581-84) and defendants' employee, Senior High School Principal Donald A. Kiah (Tr. 8-21-72 at 555-59) testified to the effect that further delay would engender educationally unsound disrespect for the law and all authority, that delay caused uncertainty and a loss of loyalty and identity with schools for those who would be transferred, and finally that the uncertainty and anguish felt by parents pending a change is such that it is best for the schools that necessary change be made as soon as possible.

10. The Board of Education voted, unanimously, on August 1, 1972, to implement desegregation plans for both senior and junior high schools in February, 1973 (J.A. 60a) even though all testimony was to the effect that these grade levels posed many more problems than did elementary schools (Opinion of 8-31-72 at A. 18a). Thus, the very Board charged by law with the sole responsibility for making educational policy decisions did not consider it educationally undesirable to implement mid-year changes.

11. Defendants' and intervenors' counsel both stated that all the bus equipment to be used and all routes contemplated under the plan are safe (Tr. 12-26-72 at 12 and 30).

Given these facts, it borders on fancy to suggest that the district court abused its wide discretion, *Swann*, supra, in approving the plan or, having approved it, in ordering it implemented immediately. *See, Alexander v. Holmes Co. Brd. of Educ.*, 396 U.S. 19 (1969); *Carter v. West Feliciana, Parish Sch. Bd.*, 396 U.S. 290 (1970).

C. Intervenors Were Not Denied Due Process.

1. *Intervenors Consented to Limitations on Their Intervention.*

It is apparent on the face of the order permitting intervention that petitioner intervenors consented to the limitations on their position. That order provided, in part:

> "6. Counsel for the parties have orally informed the Court that the within Order, and each and every one of its terms and provisions, is fully and completely acceptable to them and to their respective clients" (P.A. 72a).

The circumstance surrounding this order, although apparent on the record, may have been overlooked by present counsel for petitioner-intervenors, who replaced original counsel in February, 1973. The motion to intervene was made on August 23, 1972, 6 months after suit was filed and 1 month after the district court's declaratory judgment. The intervention was timed just as the district court was preparing to hold hearings on remedial questions. Time was pressing, schools were due to open in a few weeks, and plaintiffs objected to intervention because it was, in plaintiff's view, a transparent attempt to delay by relitigating settled issues. With that objection in mind, and stated, plaintiffs

offered to withdraw their objections to intervention *if but only if* intervention were limited to presentation of evidence on the remedial questions then in issue. The district court then asked intervenor's counsel if these conditions were acceptable or whether intervenors desired to press for full intervention rights. Intervenors' counsel replied that these limitations were fully acceptable to intervenors (Transcript of August 28, 1972 at 294-5). All counsel then prepared and submitted the consent order to intervention, which was signed by the district court on September 16, 1972, effective, *nunc protunc*, on September 1, 1972.

Petitioner intervenors apparently regret their choice, for it prevented them from reopening the decision of the Court which was made prior to their motion to intervene, and thus prevent them from delaying desegregation of the school system. But binding intervenors to an agreement knowingly made is hardly a denial of due process.

2. *Intervenors Proffer of "New Evidence" is Irrelevant.*

Petitioner intervenors claim denial of due process because certain "new evidence" was not received by the district court. The first such "evidence" is a letter from HEW in 1969 stating that Prince George's County had complied with Title VI. However, that letter added no new fact of significance. The specific plan desired by HEW was in the record (J.A. 225a et seq.) the consequence for particular schools are in the record in the annual enrollment breakdown of the schools (J.A. 156a et seq.) and the fact that HEW had approved the plan was in the record, contained in the letter from the Director of the Civil Rights Division of HEW stating that such earlier approval had been given but was in error (J.A. 249a).

The plan referred to by petitioner-intervenors occurred in 1969-70 when, at the request of HEW, the district redrew attendance boundaries and changed pupil assignment criteria for 9 of their then 199 schools (J.A. 225-233a). Of the nine schools affected by the change, eight remained virtually all black on the day suit was filed (J.A. 156a). One year after the adoption of this plan, 142 of 218 schools (65%) had student bodies in excess of 90% white or 80% black (J.A. 235a).

Petitioners apparently contend that the aforementioned plan converted Prince George's County to a unitary system, despite the fact that in this system which is three-quarters white, over 65% of the schools remained substantially disproportioned in racial composition. Petitioners base their assertion on a statement by an HEW official that the plan complied with the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Such a statement does not even bind HEW with respect to further provision of federal assistance. The first statement by HEW was based on the assumption that adoption of simple geographic attendance zones sufficed to comply with defendant's duty to desegregate, an assumption shown to be clearly wrong by this Court's opinions in *Swann*, supra, and *Davis v. Bd. of Commissioners*, 402 U.S. 33 (1971). Recognizing its mistake, HEW has now stated that Prince George's County school system is not in compliance (J.A. 250a). In any event, a statement by an administrator in a situation in which plaintiffs were not represented cannot bind a court in a suit brought by the plaintiffs. Thus, this Court has previously found plans inadequate which HEW had approved. See *Raney v. Board of Education*, 391 U.S. 443 (1968). And, as noted above, the full details of this earlier plan, the early HEW approval and then its subsequent withdrawal of approval were all in the record.

Petitioners also state they wish to present evidence of "causes which resulted in changing the racial makeup of the schools since 1969" (Petition, p. 14). Since there was no dismantling of the segregated system in 1969, such proof is not relevant to show that the school district has complied with the requirements of *Swann*, supra.

II.

THERE IS NO CONFLICT OF DECISION

The decision here is completely consistent with the decision of the Maryland Court of Appeals in *Borders v. Board of Education*, 265 Md. 488, 290 A.2d 510 (1972). That case involved a challenge by white parents seeking to prevent even the small modicum of desegregation which the Board had attempted at the urging of HEW in 1969-70. Since the issue before the court was the authority of the school board to take some steps towards desegregation, the court did not need to decide whether the segregation in Prince George's County was *de facto* or *de jure*. Obviously in a suit brought by white parents seeking to prevent even modest desegregation against a school board only reluctantly willing to desegregate in the face of threats of federal fund cut offs, neither side contended that any of the existing segregation was *de jure*. The court proceeded on the basis that the board acted within its power even if the system had been *de facto*, but it did not commit itself as to whether the system was in fact *de facto* or *de jure*. It did say, however, "an indefinite continuation of the present attendance lines might well raise such a presumption [that the failure to redraw attendance lines was racially motivated]." Thus, the only decision in any court as to the nature of segregation in Prince George's County schools is that of the federal court in this case. And, as the Fourth Circuit indicated upon its review of that decision, it was clearly consistent with earlier decision of the Fourth Circuit and this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER S. SMITH,
RICHARD V. FALCON,
DAVID S. BOGEN,
500 W. Baltimore St.,
Baltimore, Maryland 21201,
KENNETH L. JOHNSON,
GERALD A. SMITH,
HOWARD, BROWN AND WILLIAMS,
1500 American Building,
Baltimore, Maryland 21201,
Attorneys for Respondents,
Sylvester J. Vaughns, et al.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ..... day of June 1973, two copies of the foregoing brief were mailed, postage prepaid, to Samuel H. Depew, Esquire, 1700 K Street, N.W., Suite 302, Washington, D.C., 20006; and Paul M. Nussbaum, Esquire, 3723 — 34th Street, Mt. Rainier, Maryland, 20822.

GERALD A. SMITH.